Supreme Court, U.S.
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No. 80-478

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AIRLINE DIVISION; TEAMSTERS LOCAL 2707; MARVIN L. GRISWOLD; TEAMSTERS LOCAL 732,

Petitioners,

v.

TRANS INTERNATIONAL AIRLINES, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY BRIEF FOR THE PETITIONERS

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Petitioners,

v.

TRANS INTERNATIONAL AIRLINES, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

REPLY BRIEF FOR THE PETITIONERS

On November 17, 1980, the Respondent Trans International Airlines, Inc. (TIA)[1] was instructed to respond to the petition for certiorari filed in No. 80-478 by the International Brotherhood of Teamsters, Airline Division (Teamster Petitioners) and to the petition filed in 80-470 by the Air Line Pilots Association, International (ALPA). This reply brief is being filed by the Teamster Petitioners to respond to various matters raised for the first time by Respondent's Brief In Response.[2]

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[1] The Respondent has changed its name to Transamerica Airlines, Inc.; however, it will be referred to as "TIA" here to avoid confusion.

[2] In No. 80-480, TIA seeks certiorari to review the lower Court's unexceptional decision holding that military no-strike clauses cannot be enforced specifically through injunctions issued by the fed-

ARGUMENT

1. The Lower Court's Decision Upholding An Injunction Against Sympathetic Action Pending Arbitration Cannot Be Reconciled With This Court's Decisions.

TIA has urged review of the question whether employees can be enjoined from sympathetically honoring the picket lines of their fellow workers pending arbitration of the propriety of such sympathetic action under contractual no-strike commitments. To this extent, at least, it joins both petitioning labor organizations in recognizing the critical importance of the lower court's decision. On the other hand, we take sharp exception to TIA's contention that the lower court's decision can somehow be reconciled with this Court's decision in *Buffalo Forge Co.* v. *USW*, 428 U.S. 397 (1976).

In *Buffalo Forge*, the union had gone on strike, not because of any dispute it had with the employer, but to support other local unions of the same international organization that had struck when contract negotiations with the common employer broke down. There, as here, the sympathizing union was party to a collective bargaining agreement containing a no-strike clause which the union contended, and the employer disputed, did not prohibit sympathetic action. The employer sought an injunction against the strike pending resolution of the dispute created by the union's observance of its sister locals'

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eral district courts, and also to have this Court decide whether sympathetic action is prohibited by the major dispute provisions of the Railway Labor Act, 45 U.S.C. §§ 152, First, 155, 156, 160, an issue the court below expressly declined to reach. Obviously attempting to bootstrap its own cause in No. 80-480, TIA has reiterated here the arguments it made in its petition. In the Teamsters' Brief In Oposition, we responded to TIA's petition by showing that the distinct issues raised there do not warrant this Court's attention and that they are quite different from the questions presented for review in Nos. 80-478 and 80-470. There is no need for us to repeat what already has been made clear, and thus we will rely on our opposition brief ("IBT Op. Br.") to avoid repetition.

picket lines through arbitration. Injunctive relief was denied in both lower courts and this Court affirmed.

The Court concluded in its opinion that the reasoning of *Boys Markets, Inc.* v. *Retail Clerks*, 398 U.S. 235 (1970), which held that the federal policy favoring arbitration warranted preliminary injunctive relief against strikes over arbitrable grievances, was inapplicable to sympathetic work stoppages. This was because the arbitration process cannot be frustrated where, as here, there is no underlying issue other than the strike itself to be arbitrated, and thus the anti-injunction policy embodied in § 4 of the Norris-LaGuardia Act, 29 U.S.C. § 104, must prevail. Significantly, the Court said:

> "If an injunction could issue against the strike in this case, so in proper circumstances could a court enjoin any other alleged breach of contract pending the exhaustion of the applicable grievance and arbitration provisions even though the injunction would otherwise violate one of the express prohibitions of § 4. The court in such cases would be permitted, if the dispute was arbitrable, to hold hearings, make findings of fact, interpret the applicable provisions of the contract and issue injunctions so as to restore the status quo or to otherwise regulate the relationship of parties pending exhaustion of the arbitration process. This would cut deeply into the policy of the Norris-LaGuardia Act and make the courts potential participants in a wide range of arbitrable disputes under the many existing and future collective bargaining contracts, not just for the purpose of enforcing promises to arbitrate, which was the limit of Boys Markets, but for the purpose of preliminarily dealings with the merits of the factual and legal issues that are subjects for the arbitrator and of issuing injunctions that would otherwise be forbidden by the Norris-LaGuardia Act." [*Buffalo Forge Co. v. United Steelworkers, supra*, 428 U.S. at 410-11. (Footnotes omitted.)]

Notably TIA does not dispute the district court's conclusion that the facts of this case and those of *Buffalo Forge* are virtually identical (Pet. App., at 17a). Indeed, the Ninth Circuit Court of Appeals' decision is not premised on any factual difference. Nevertheless, the court of appeals declined to follow *Buffalo Forge*, effectively holding that Norris-LaGuardia's protections have a more limited application to labor disputes arising in the rail and air industries than to labor disputes in other industries. The Norris-LaGuardia Act, of course, admits of no such distinction in its definition of "labor dispute." 29 U.S.C. § 113.

Nor can the result reached by the court of appeals be justified on the basis of accommodating Norris-LaGuardia to the specific commands of the Railway Labor Act. The court below cited no specific requirement, either in the RLA itself or in its legislative history, that could be contravened by sympathetic action.[3] And, the RLA's policies mandating arbitration as the "means for the settlement of minor disputes known as 'grievances,'"[4] as elaborated by this Court in *BRT* v. *Chicago River & Ind. R.R.*, 353 U.S. 30 (1957), "apply with equal force" to injunctions under § 301 of the LMRA. *Sinclair Refining Co.* v. *Atkinson*, 370 U.S. 195, 249 (1962) (Brennan, J., dissenting); *Boys Markets, Inc.* v. *Retail Clerks*, *supra*, 398 U.S. at 252. See also *Textile Workers* v. *Lincoln Mills*, 353 U.S. 448, 458 (1957).

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[3] One of the RLA's general purposes, of course, is to avoid interruptions to transportation (Pet. App., at 61a), a purpose that is identical to the LMRA's object of avoiding "industrial strife which interferes with the normal flow of commerce . . . ." 29 U.S.C. § 141. Literal application of this general policy "would obviously outlaw any and all strikes in the rail and air industries . . . ." D. E. Cullen, *Strike Experience Under the Railway Labor Act*, in "The Railway Labor Act at Fifty" 188 (1976).

[4] H. Rep. No. 1944, 73d Cong., 2d Sess. 2 (1934), in Subcomm. on Labor, Senate Comm. on Labor and Public Welfare, *Legislaitve History of the Railway Labor Act, As Amended* 919 (1974).

In *BRT* v. *Jacksonville Terminal Co.*, 394 U.S. 344, 385-86 (1969), moreover, this Court rejected any purported distinction in the right of self-help available under the RLA and the LMRA, stating:

> "The Court has consistently held peaceful primary picketing incident to a lawful strike to be protected conduct under the National Labor Relations Act. 'Picketing has traditionally been a major weapon to implement the goals of a strike' and 'it is implicit in the Act that the public interest is served by freedom of labor to use the weapon of picketing.' We see no possible grounds for distinguishing picketing under the Railway Labor Act. Peaceful primary strikes and picketing incident thereto lie within the core of protected self-help under the Railway Labor Act." [Citations omitted.]

Consequently, the Court below had no valid reason for its refusal to follow *Buffalo Forge*. The relevant statutory policies in the RLA and the LMRA are the same; in this case, the anti-injunction policy of Norris-LaGuardia should also prevail. Nothing TIA says requires a different result. Its novel argument that the RLA itself, independent of any contractual no-strike clause, imports a statutory prohibition against sympathetic action incident to a lawful primary strike is either circular or contrary to existing authority.[5] More signifi-

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[5] TIA's statutory argument is more than a little imprecise. If TIA contends that § 2, First requires that the no-strike clause be maintained, then its theory of a statutory violation presupposes a breach of that clause. But this determination is for the adjustment board, which has exclusive jurisdiction over minor disputes (*O'Donnell* v. *Wien Air Alaska, Inc.*, 551 F.2d 1141 (9th Cir. 1977)), and § 2, First adds nothing to the court's authority to enforce the board's award. *IAM* v. *Central Airlines, Inc.*, 372 U.S. 682 (1963). To the extent TIA contends that § 2, First is a contract enforcement device akin to § 301 of the LMRA, 29 U.S.C. § 185, it is simply wrong. See IBT Op. Br., at 9-16. Finally, in the absence of a no-strike clause, sympathetic action does not even arguably violate

cantly, TIA offers no rationale[6] for the court of appeals' implication of an independent federal remedy against self-help—a remedy created not to vindicate the Act's minor dispute procedure, which was the limit of *Chicago River*,[7] but to minimize the economic pressure employees can exert in major disputes.[8]

The issue presented for review in Nos. 80-470 and 80-478 should be resolved by this Court because the lower court's decision is inconsistent with *Buffalo Forge*. Also, an issue of this importance, having an immediate and dramatic impact on labor relations in the nation's rail and air industries, should not be determined by a split panel of the court of appeals.

2. This Case Is Moot Under The Standards Established By This Court.

The facts enumerated by TIA (Br., at 15-16) disclose no basis for distinguishing *Gompers* v. *Buck's Stove & Range Co.*, 221 U.S. 418 (1911) (*Gompers II*). Contrary to its assertions, TIA was not entitled to settle

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the RLA. *BRT* v. *Atlantic Coast Line R.R.*, 362 F.2d 649 (5th Cir.), *aff'd by an equally divided court*, 385 U.S. 20 (1966); *BLFE* v. *Florida E. Coast Ry.*, 346 F.2d 673 (5th Cir. 1965); *Chicago & Ill. Midland Ry.* v. *BRT*, 315 F.2d 771, 776-78 (7th Cir.) (dissenting opinion), *vacated as moot*, 375 U.S. 18 (1963).

[6] TIA's discussion contrasting the RLA's major dispute procedure with how contracts are negotiated under the LMRA (TIA Br., at 11-13), is irrelevant to the issue decided by the court below (see IBT Op. Br., at 17-20). Because breach of a no-strike clause does not constitute an unfair labor practice (*Cheney California Lumber Co.* v. *NLRB*, 319 F.2d 375, 378 (9th Cir. 1963)), TIA's doubtful description of the NLRB's administrative procedures for remedying unfair labor practices (TIA Br., at 13) is also beside the point. Its remaining statements (TIA Br., at 14) are both unsupported and unsupportable.

[7] *BRT* v. *Chicago River & Ind. R.R.*, *supra*, 353 U.S. 30.

[8] *BLFE* v. *Florida E. Coast Ry.*, *supra*, 346 F.2d at 676.

fully the underlying dispute which led to the grant of preliminary injunctive relief, thereby obviating the need for a final injunction and mooting the main case, and still continue to press its injunction case. Certainly the same dispute cannot be both settled and litigated. TIA's comments regarding the absence of a "back-to-work" agreement are irrelevant, since the dispute which gave rise to the main action was fully settled without such an agreement.[9] Thus, at this point, the main case was in the same posture as *Buck's Stove & Range Co.* v. *Gompers*, 219 U.S. 581 (1911) (*Gompers I*).

This Court's decision in *Gompers II* was not based on "waiver." It cannot realistically be argued that Buck's, in settling the main action, intended to end the contempt case, which this Court held to be civil in nature and thus ancillary to the main action. Accordingly, it is immaterial here whether TIA, by effectively settling the main injunctive action, intended to continue the derivative contempt proceeding.[10] The latter "proceeding necessarily ended with the settlement of the main cause of which it is a part . . . ." 221 U.S. at 452.[11]

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[9] There was no mutual understanding that the parties "retained all prior claims spawned by the strike" (TIA Br., at 16-17); indeed, no agreement at all was reached, and the parties were left to pursue whatever legal remedies they possessed.

[10] TIA persists in arguing this issue as if a factual issue exists over whether it agreed in January, 1978, that the contempt proceeding would be dismissed. There was no such agreement, no factual issue, and no need for a record on this point.

[11] The July 23, 1979 affidavit submitted in response to the court of appeals' show cause order, which apparently is not fully understood by TIA (see Br., at 15), is reproduced in Appendix B, *infra* at 3a. The court below had little difficulty in understanding it, however (Pet. App., at 37a), and there can be no doubt that it clearly raised the *Gompers II* issue, *infra* at 9a.

3. The Lower Court Correctly Held That The Military No-Strike Clause Could Not Be Specifically Enforced By Injunctive Order. Review Of This Issue, Presented By TIA's Petition In No. 80-480, Is Not Warranted.

As shown (IBT Op. Br., at 9-16), the only basis on which the equity jurisdiction of the federal courts can be invoked in a railway or airline labor dispute is to protect the integrity of the Railway Labor Act's dispute settlement mechanisms. In this case, the Act's major dispute procedures were exhausted in an unsuccessful, good-faith attempt to reach agreement. Since the Act's procedures were not endangered by the threatened strike against military flights, the Norris-LaGuardia Act precluded the district court from specifically enforcing the military no-strike clause. Not surprisingly, TIA's view of § 2, First as an independent contract enforcement device—instead of an element in "an integrated, harmonious scheme for preserving the status quo from the beginning of the major dispute through the final 30-day 'cooling-off' period" [12]—was rejected by the Court below.

Long Island R.R. v. *System Federation No. 156*, 368 F.2d 50 (2d Cir. 1966), which involved bad-faith bargaining and failure to exhaust the Act's procedures, does not support TIA's view of the Act. There the Second Circuit Court of Appeals upheld an injunction against a strike having two objects: (1) to force the railroad to bypass the System Federation (the "representative" of the railroad's shop craft employees) and negotiate directly with Railway Carmen's Lodge 886; and (2) to compel the railroad to grant wage increases and make rules changes, even though the applicable national and local agreements would not expire for another year. Stating that the union had "short-circuit[ed]" the Act, the court of appeals held: "Since the carmen did not

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[12] *Detroit & Toledo Shore Line R.R.* v. *UTU*, 396 U.S. 142, 152 (1969).

utilize the procedures of the Act for minor or major disputes—indeed did not even initiate them—the union's resort to self-help was unwarranted." *Id.* at 53.

Attempting to transform the military no-strike clause into an agreement on contract duration, which it obviously was not, TIA urges that the entire collective bargaining agreement was continued beyond the status quo period with respect to military flights by the clause (TIA Br., at 6). This is incorrect. The contract was continued with respect to military flights, not by agreement of the parties reached in free collective bargaining, but by court decree (Pet. App., at 10a). By its terms, the military no-strike clause had nothing to do with the duration of the agreement. And, reliance on the court's artificial extension of the agreement beyond its expiration cannot turn the military no-strike clause into something it is not.

In fact, the district court's order serves to illustrate the error it made in enforcing the clause by injunctive decree. Once having ordered the flight attendants to work during their lawful primary strike, the district court realized that it had tipped the balance of economic power in favor of the carrier (Pet. App., at 7a). It then sought to remedy the situation by ordering TIA to adhere to the agreement in connection with its operation of military flights (Pet. App., at 10a), thereby establishing the terms and conditions under which the flight attendants would work. *Compare H. K. Porter Co.* v. *NLRB*, 397 U.S. 99 (1970). As the court of appeals held in reversing, the Norris-LaGuardia Act was enacted to prevent the federal courts from altering, through injunctions, the economic balance between labor and management (Pet. App., at 54a).

CONCLUSION

For the foregoing reasons, the petition for certiorari in No. 80-478 should be granted, and the petition in No. 80-480 should be denied.

Respectfully submitted,

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DATED: January 14, 1981

Appendices

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Nos. 77-3362, 77-3363, 77-3395, 77-3781, 78-1148, and 78-1232

DC# Cv 77-2010 RFP

TRANS INTERNAL * AIRLINES, INC.,
Plaintiff-Cross-Appellant,

vs.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, etc., AIRLINE DIVISION TEAMSTERS LOCAL 2707; MARVIN G. GRISWOLD; TEAMSTERS LOCAL 732,
Defendants-Cross-Appellees.

TRANS INTERNATIONAL AIRLINES, INC.,
Plaintiff-Appellee-Cross-Appellant.

vs.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, *et al.*,
Defendants-Appellants/Cross Appellees.

Appeal from the United States District Court for the Northern District of California

JUDGMENT

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California and was duly submitted.

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* So in original.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed in part, reversed in part and remanded for further proceedings.

The parties shall bear their own costs for the appeals take * to this court.

Filed and entered February 14, 1980.

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* So in original.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Nos. 77-3362, 77-3363, 77-3395 and 77-3781

TRANS INTERNATIONAL AIRLINES, INC.,
Appellant, Cross-Appellee.

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AIRLINE DIVISION, TEAMSTERS LOCAL 2707, AIRLINE, AEROSPACE AND ALLIED EMPLOYEES; MARVIN G. GRISWOLD; AND TEAMSTERS LOCAL 732,
Appellees, Cross-Appellants,

Nos. 78-1148 and 78-1232

TRANS INTERNATIONAL AIRLINES, INC.,
Appellee, Cross-Appellant,

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AIRLINE DIVISION; TEAMSTERS LOCAL 2707; AND AIRLINE PILOTS ASSOCIATION INTERNATIONAL, AFL-CIO,
Appellants, Cross-Appellees.

AFFIDAVIT IN RESPONSE TO THE COURT'S ORDER OF JULY 5, 1979

Appeal From The United States District Court
For The Northern District Of California

Before: GOODWIN, WALLACE and KENNEDY, Circuit Judges

AFFIDAVIT

DISTRICT OF COLUMBIA)
) ss:
WASHINGTON,)

I, ROLAND P. WILDER, JR., of 25 Louisiana Avenue, N.W., Washington, D.C. 20001, being duly sworn, do hereby depose and say:

1. Your affiant is a lawyer licensed to practice in Washington of the District of Columbia. I am a member of the Bar of the United States Court of Appeals for the Ninth Circuit. By permission, I have represented the International Brotherhood of Teamsters Airline Division, Teamsters Local Unions 732 and 2707, Marvin L. Griswold and Henry J. Breen [hereinafter "Teamster defendants"], before the District Court and in appellate proceedings before this Court. For purposes of this cose, I am associated with Kenneth L. Silbert, Esquire, Beeson, Tayer & Kovach, 100 Bush Street, San Francisco, California-94104, and Robert J. Higgins, Esquire, Dickstein, Shapiro & Morin, 2101 L Street, N.W., Washington, D.C.-20037.

2. This affidavit is submitted in accordance with this Court's Order of July 5, 1979, directing that cause be shown why this appeal should not be dismissed as moot. The Order requires a specific enumeration of the issues,

whether of law or fact, "which constitute a case or controversy within the meaning of Article III of the United States Constitution and *Illinois State Board of Elections* v. *Socialist Workers Party*, 47 U.S.L.W. 4197, 4201 (U.S., Feb. 22, 1979)." The Teamster defendants contend that this appeal cannot be dismissed unless a mandate issues directing the lower Court to dismiss the main case and ancillary civil contempt proceedings for mootness.

3. These consolidated cases are before the Court under 28 U.S.C. § 1292 and 29 U.S.C. § 110, upon appeals from the District Court's orders enjoining the Teamster defendants (then the representative of TIA's flight attendants and flight engineers) and the Air Line Pilots Association (the representative of TIA's pilots) from interfering with TIA's military flight operations during a strike beginning in September, 1977, by the flight attendants. [96 L.R.R.M. 2763, 2766.] TIA has cross-appealed from the District Court's refusal to enjoin strike activity by the flight atendants against commercial operations, as well as from its refusal to enjoin sympathetic action by the flight engineers and pilots affecting nonmilitary traffic.

4. The Teamster defendants noticed their appeal from the District Court's injunctive orders on Ocotber 4, 1977. After their application to suspend the injunctions was denied by the District Court, they moved this Court to stay the injunctions pending appeal. TIA cross-moved for temporary relief pending appeal in an attempt to obtain the relief denied it by the District Court. These motions were argued before a panel of this Court on October 19, 1977, and remain under submission. The main appeal has been briefed by all parties and is awaiting argument.

5. During the strike, TIA filed a Petition for Adjudication in Civil Contempt, which came on for hearing before the Honorable Cecil F. Poole on November 1, 1977. Judge Poole found that beginning on Sunday, October 30,

1977 and continuing to 7:52 P.M. on November 1, 1977, the Teamster defendants were in contempt of the preliminary injunction orders. No evidence was taken on the amount of damages allegedly suffered by TIA. Nor did TIA specify the amount of compensatory damages it sought. Judge Poole ordered that "the matters of award of compensation to the plaintiff" be referred to Chief Judge Peckham, who had issued the preliminary injunctions. On November 9, 1977, the Teamster defendants appealed from the contempt adjudication (Case Nos. 78-1091, -1092). These appeals were dismissed on November 24, 1978, by this Court.

6. The basic question regarding the validity of the injunctive orders, of course, was already pending before this Court by reason of the instant appeals. Discovery and trial on the question of compensatory damages, if any, due TIA because of the Teamster defendants' conduct on October 30, 31 and November 1, 1977, has been continued until this Court decides the pending appeals. For TIA's entitlement to compensatory damages, in the first instance, turns on whether the preliminary injunctive orders were lawfully entered.[1]

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[1] "A judgment of civil contempt, being remedial in nature, stands or falls within the validity or invalidity of the order, and the opposing party should be compensated only if he was entitled to the order." *Lewis* v. *S. S. Baune*, 534 F.2d 1115, 1119 (5th Cir. 1976) (citations omitted). *Accord, e.g., United States* v. *United Mineworkers*, 330 U.S. 258, 304 (1947), (the right of "a civil litigant to the compensatory fine is dependent upon the outcome of the basic controversy"); *Latrobe Steel Co.* v. *United Steelworkers*, 545 F.2d 1336, 1345-46 (3d Cir. 1976) ("a compensatory civil contempt judgment cannot withstand the reversal of an injunction . . . a private party should not profit as a result of an order to which [it is later determined] he was never entitled"); *Heyman* v. *Kline*, 456 F.2d 123, 131 (2d Cir.), *cert. denied*, 409 U.S. 847 (1972) ("judgments of civil contempt fall when the order underlying them is vacated"); *Salvage Process Corp.* v. *Acme Tank Cleaning Process Corp.*, 86 F.2d 727 (2d Cir. 1936) ("[t]o let the

7. The flight attendant strike continued from September 10, 1977 until early January, 1978, when TIA and the Teamster deefndants entered into a new flight attendant agreement effective for a three-year term. Strike activity was not resumed after agreement was reached. The new agreement inculdes a military clause containing the same terms as the one in issue on this appeal.

8. Substantial difficulties were encountered in January, 1978, regarding the reinstatement of strikers, the rights of Union negotiating committee members, and the resolution of certain employee claims that had arisen during and after the strike. These matters led to the filing of a counterclaim by the Teamster defendants on February 1, 1978, asserting a variety of claims against TIA. Thereafter, TIA moved to dismiss the counterclaim. Its dismissal motion has been briefed and argued along with various discovery motions. All motions were submitted on May 7, 1979, and are currently pending decision before the District Court.

9. The Teamster defendants no longer represent the flight attendant craft or class on TIA's property. Following an election in which the flight attendants voted to change their representative, the National Mediation Board certified the Association of Flight Attendants as the statutory collective bargaining agent for the craft or class. [*Trans International Airlines, Inc.*, Case No. R-4931 (NMB, June 4, 1979).]

10. The District Court has been advised of the Teamster defendants' loss of representative status, and of the fact that this development appears to raise difficult questions regarding the Teamster defendants' right to

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liability stand for past contumacy would be to give the plaintiff a remedy not for a right but for a wrong, which the law should not do").

continue to act in reference to the counterclaim.[2] It was suggested that the Court might wish to withhold temporarily its decision on pending motions until the Teamsters Union could bring the issues raised by loss of its representative status before the Court in an appropriate manner.

11. In regard to this Court's July 5, 1979 Order to show that "'(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or termination, and (2) there . . . [is] a reasonable expectation that the same complaining party would be subjected to the same action again,'"[3] I note the following:

a. There can be no expectation that TIA will be subjected to the Teamster defendants' alleged bad-faith bargaining tactics, since TIA's flight attendants now have a different bargaining representative. Thus, TIA's appeal from the District Court's refusal to enjoin a strike against the Carrier's commercial operations is clearly moot.[4] Similarly the Teamster defendants could hardly direct flight attendants to strike TIA's military operations in the absence of representative status.

b. Although it is conceivable that the Teamster-represented flight engineers might sympathetically respect a future picket line established by the Association of Flight Attendants, this decision would have

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[2] *International Brotherhood of Teamsters* v. *Zantop Air Transport Corp.*, 394 F.2d 36 (6th Cir. 1968); *Cf. Adams* v. *Federal Express Corp.*, 547 F.2d 319 (6th Cir. 1976), *cert. denied*, 431 U.S. 915 (1977).

[3] *Illinois State Board of Elections* v. *Socialist Workers Party*, *supra*, 47 U.S.L.W. at 4201.

[4] The Teamster defendants have already argued that this aspect of the Carrier's cross-appeal is moot. See Brief of Defendants-Appellees/Cross-Appellants, at p. 14, n.3.

to be made when and if the flight attendants strike after their current contract expires and they have exhausted the Railway Labor Act's procedures. Because no one can foresee what circumstances will prevail several years into the future, nothing more can be said than the flight engineers' sympathetic action in 1977 on behalf of the flight attendants is capable of repetition.

12. The question of whether the Teamster defendants' appeals from the District Court's military strike injunctions present a case or controversy, in one sense, turns on the civil contempt proceeding. Certainly if the contempt proceeding is to continue into a compensatory fine phase, the validity of the original injunctions is very much a live issue. TIA cannot recover any damages if, as the Teamster defendants contend in these appeals, the military strike injunctions are invalid. [See authorities cited in note 1, *supra.*] Basic considerations of fairness militate against further prosecution of a civil contempt action after the contemnor's right to defend on the ground that the injunction was improvidently issued has been taken away by a determination that the main action has become moot.[5]

13. TIA posted a $10,000 bond to indemnify the Teamster defendants for fees, costs and injury suffered in the event it was subsequently determined that the preliminary injunctions had been improvidently granted. The right of the Teamster defendants to indemnification

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[5] Upon a determination that the main action has become moot and thus unreviewable on appeal, the lower Court loses jurisdiction over pending civil contempt proceedings. *Gompers* v. *Buck's Stove & Range Co.*, 221 U.S. 418, 451-52 (1911). This is because no independent jurisdictional basis for the contempt exists apart from the main action. "[W]ithout a final decree, a civil contempt order cannot have any finality." *Pacific Gamble Robinson Co.* v. *Minneapolis & St. Louis Ry.*, 92 F. Supp. 352, 354 (D. Minn. 1950), citing *Fox* v. *Capital Co.*, 299 U.S. 105 (1936).

depends upon a decision on the merits.[6] Unless this right is waived, these cases are not moot.[7] I have been instructed to, and hereby do, enter a conditional waiver of the Teamster defendants' right to claim on the indemnification bond. Thus, if final dismissal of the main case and all civil contempt proceedings for mootness is otherwise warranted, the Teamster defendants waive their right to seek indemnification.

14. If, due to continuation of the civil contempt proceedings, a controversy remains regarding the validity of the District Court's military strike injunction, the following issues are before the Court:

a. Does a provision in a collective bargaining agreement subject to the Railway Labor Act remain in effect after a Section 6 Notice, proposing changes in the provision, has been given, and the proposed changes have been fully processed under the Act's mandatory procedures through the thirty day "cooling-off" period?

b. Did the District Court lack jurisdiction to enforce by injunction a military no-strike clause that allegedly survived exhaustion of the mandatory procedures prescribed by the Act according to the parties' intent?

(1) Do the Federal Courts have either diversity or Federal question jurisdiction to enforce the provisions of collective bargaining agreements subject to the Railway Labor Act?

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[6] *NAPA Pittsburgh, Inc.* v. *Automotive Chauffeurs, Local 926*, 502 F.2d 321, 322 n.1 (3d Cir.), *cert. denied*, 419 U.S. 1049 (1974).

[7] *Liner* v. *Jafco, Inc.*, 375 U.S. 301, 305 (1964); *Associated General Contractors of Minnesota* v. *I.U.O.E., Twin City Local 49*, 519 F.2d 269 (8th Cir. 1975); *Rochester Tel. Corp.* v. *C.W.A.*, 456 F.2d 1057 (2d Cir. 1972); *NAPA Pittsburgh, Inc.* v. *Automotive Chauffeurs, Local 926, supra*, 502 F.2d at 322 n.1.

(2) Does the Norris-LaGuardia Act prohibit issuance of an injunction to specifically enforce a no-strike clause?

c. Did the District Court lack jurisdiction under the Railway Labor and Norris-LaGuardia Acts to enjoin flight engineers employed by the Carrier from respecting the picket lines established by its flight attendants, where the engineers' concerted activity did not relate to an arbitrable dispute between them and the Carrier, but was resorted to solely to support the flight attendants in their major dispute?

15. I have served a copy of this Affidavit upon each attorney of record in accordance with the attached Certificate of Service.

I have read the foregoing Affidavit consisting of fifteen paragraphs, and, except for footnotes and bracketed material unsuitable for verification, it is true and correct to the best of my knowledge, information and belief.

/s/ Roland P. Wilder, Jr.
ROLAND P. WILDER, JR.

Subscribed and sworn to before me this 23rd day of July, 1979.

/s/ Melvin Hardy
Notary Public

My Commission Expires June 30, 1981.

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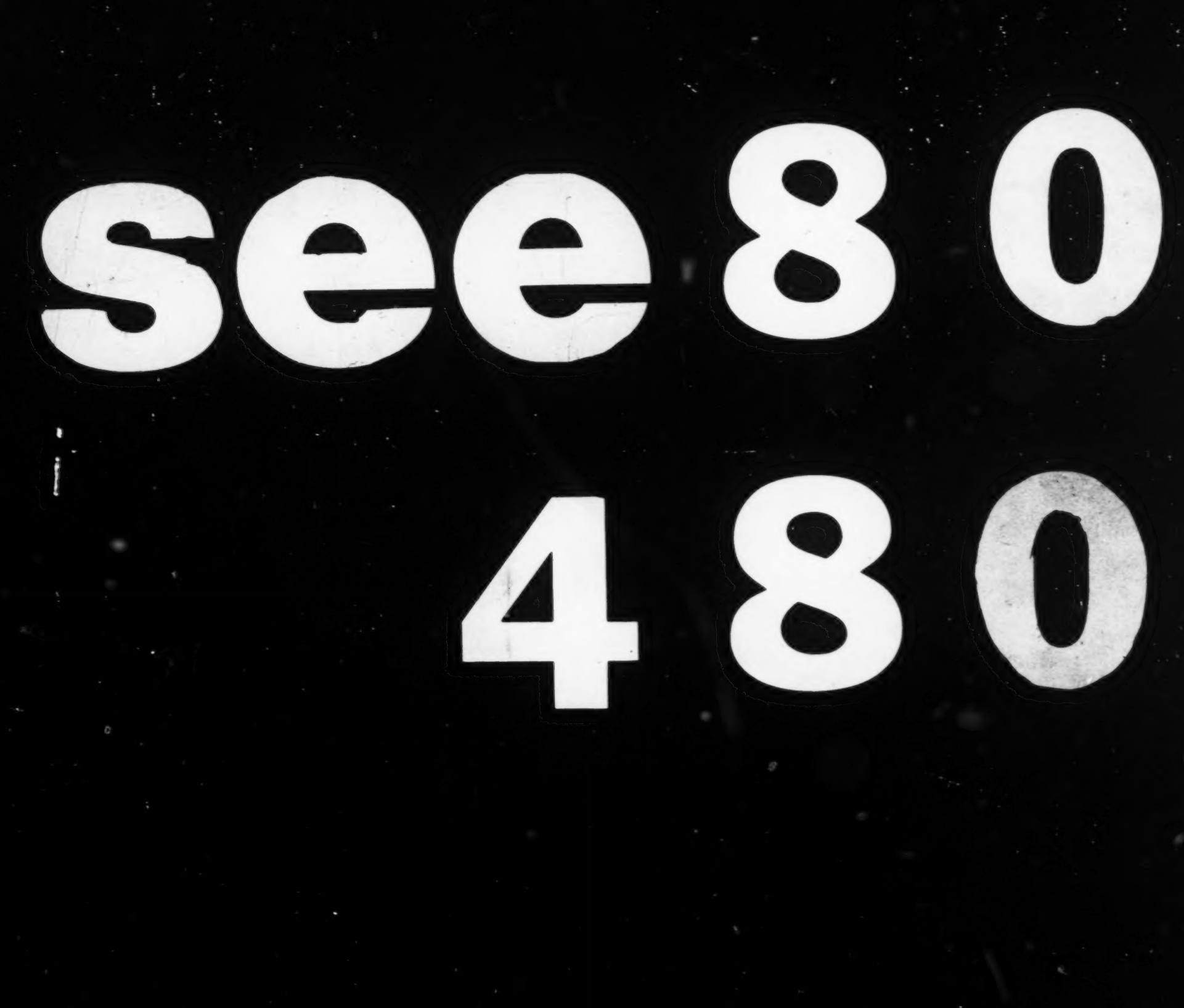
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